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INDEPENDENT COMMISSION AGAINST CORRUPTION

PATRICIA McDONALD SC
COMMISSIONER

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OPERATION DASHA

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON THURSDAY 13 DECEMBER, 2018

AT 10.00AM

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This transcript has been prepared in accordance with conventions used in the Supreme Court.

MR BUCHANAN: No administrative matters.

THE COMMISSIONER: All right. Mr Montague.

THE COMMISSIONER: All right, Mr Buchanan.

MR BUCHANAN: Commissioner. Mr Montague, you've mentioned a couple of times in your evidence clause 4.6 of the Canterbury Local Environment Plan. In development proposals the subject of this inquiry, applicants or proponents made submissions that planning controls, such as height limits or FSR limits, floor space ratio limits, should be varied under 4.6 of the LEP. You can see part of clause 4.6 on the screen there in front of you. It had a number of conditions that had to be met before the discretion that it gave consent authorities could be exercised to allow for an exception to development standards. It was often called a variation of development standards. And I just want to explain to you that the Commission is interested in the exercise of clause 4.6 at Canterbury in the case of 548-568 Canterbury Road, the Harrison's site, for the two additional storeys on the approved development. That proposed development involved a significant height limit exceedance. The proponent there was Mr Demian.---That's right.

In the case of 570 Canterbury Road, the carpet shop site next door for the DA for two additional storeys on the approved development, that proposed development involves significant height limit exceedance, and again the proponent was Mr Demian. In the case of 538 Canterbury Road, that's on the eastern side of the Harrison's lot, the car wash site, the DA for two additional storeys on the approved development there. The proposed development involved a significant height limit exceedance and the proponent was Mr Maroun.---I think so, yep.

And in the case of 212-222 Canterbury Road and 4 Close Street, which were, as it were, new developments from the ground up, that was what the DA proposed, the DAs plural proposed. Those proposed developments involved significant FSR exceedances and the proponents were the Chanine brothers.---I believe so, yes.

In 2015 did you have a view about the use of clause 4.6 to exempt proposed developments from planning controls on the LEP, such as height limits and maximum floor space ratios?---No, I didn't have a particular view. I don't know that much about 4.6, how it actually works but I would have assumed, I guess, that had 4.6 been applied it would have been in order to do that and it would have satisfied the criteria and that may lead to a better quality development. I, I, I don't know. But 4.6 was certainly a mechanism available, as I understand it, to developers to achieve certain outcomes.

And you don't have a memory of having an input into the use of clause 4.6 or the application of it in any particular case?---No, not at all.

And certainly not generally, that is to say, you weren't party to a conversation involving anyone, such as Mr Stavis, about the use of clause 4.6 for the proposed developments in the Canterbury area?---No. I had left that up to the experts to assess.

10 Did any developer – or if not developer, proponent – ever suggest to you that because Canterbury City Council had voted to increase a height limit and for a planning proposal to be prepared to progress that policy stance, it was not necessary to wait for the planning proposal to be finalised because the proposed development already met the objectives of council, the policy of council?---No. I've got no recollection of any of that. I didn't take any part in any of the controls or the preparation. As I said, I, to this day I don't fully understand how 4.6 works.

20 So just to be more precise about it, did Mr Demian ever discuss with you the use of clause 4.6 for any of his proposed developments?---I would say discuss. He may have mentioned it in passing but it was just general chatter. There was no, no, we didn't discuss it because, as I said, I'm not a planner. It would have been over my head most of it.

Were you aware of any divergence, difference of views between people as to the extent to which clause 4.6 could be utilised in circumstances where council had resolved to change a planning control and for a planning proposal to progress that policy change?---When you say people, are you referring to councillors for example?

Anyone at all actually.---No.

30 So developers, councillors, staff.---No. 4.6 was, was mentioned repeatedly in my presence in various forums just incidentally, and it seemed to me that people, developers in particular, were using it to achieve certain planning outcomes whether, and I assumed of course that had the council approved a 4.6 variation that it would have done so mindful of the requirements of, of that provision, that they satisfied the provisions.

40 So just thinking back on it now, did you ever become aware of any tension between what developers were trying to achieve on the one hand by using clause 4.6 and what your own staff in the planning division thought as to whether that was legitimate where it was being done, as it were, on the back of a council resolution to change a planning control and move that forward by way of planning proposal?---No, no.

Were you ever aware that the IHAP at Canterbury was concerned about the use of clause 4.6 to exempt a proposed development from planning controls using the rationale that council had resolved to change the planning control and so it was okay to use clause 4.6 even though the LEP had not in fact been changed?---No. I, I had nothing to do with the operation of the IHAP.

It was completely independent of the council, as it should be, and we had staff in the organisation who serviced the IHAP but I wasn't involved at all.

10 You would have been aware of – I withdraw that. You would have read IHAP reports, though, wouldn't you?---I didn't always read them. I didn't need to. I mean, they had to come back to council eventually and the council had to make a decision. Often, or not often but occasionally, the opinion of the IHAP differed from that of the senior officer or the planning director, that wasn't uncommon, but usually they were fairly minor variations or minor differences.

20 Were there any major differences that you recall occurring during your tenure?---The only time I can remember as I said earlier in evidence was that meeting in October '13 where there were a number of applications submitted to council where the IHAP I believe and the director of planning or the planning division had a view, they weren't necessarily the same view but they were generally in line, and the council refused, or the council rejected the recommendations of both the IHAP and the officers at that time. I'm pretty sure I'm right.

30 You have mentioned that before and I, on the last time that you mentioned that I suggested that you might be conflating two different events, and what I suggested to you and I suggest to you again is that in October 2013 what was happening was the report by Mr Occhiuzzi recommending adoption of the Residential Development Strategy Report was savaged by Mr Hawatt and Mr Azzi by way of numerous motions in respect of specific sites to change the planning controls to allow for more intensive development on those sites.---Yes.

40 And it didn't involve the IHAP.---No, but, but, well, I can't recall the details now but I thought it did involve the IHAP and some of those applications. The IHAP had run extremely well for all the years since it had been established until that night in October 2013. That's when I think certain councillors started to work against the IHAP. There may have even been – and I don't know this – but there may have even been consideration to dismantle the IHAP. In their minds, they - - -

I just want to check – I'm sorry.---They might have been thinking along those lines because my view, and this is just sheer conjecture on my part, is that some of the councillors felt that the IHAP was now an obstacle.

And when you say some, do you mean Mr Hawatt and Mr Azzi?---Well, particularly them, yes, but others may have had the same view.

The IHAP, though, I just want to suggest to you, on the material before the Commission, didn't have any input into the Residential Development Strategy, either as reported to council in October 2013 or as ultimately adopted by council in October 2014.---Yeah, I don't believe the IHAP had

any involvement in the preparation of that, you're right. That's a policy decision. But there were applications subsequent to that that, that did come to IHAP that may have had some sort of relationship to those earlier policy decisions.

Certainly. Certainly. I just want to take you up, though, on something that you said. You have an impression anyway, you've assigned it to October 2013, but you have a memory that the IHAP process had been going quite well up until a point - - -?---Yes.

10

- - - when it fell out of favour with at least Councillors Azzi and Hawatt, is that right?---I wouldn't go as far as to say it fell out of favour, but it was subjected to questioning that had happened in the past. It had been formed I think by that stage around six or eight years, I can't remember, but it had been doing very well indeed. It was a marvellous thing the council did in introducing the IHAP and it was working perfectly. But in 2012, after 2012, I got the impression, just an impression I got, that some of the councillors, including the two you named, saw the IHAP as being an impediment perhaps, and, and, and they were, Hawatt in particular, I remember one
20 occasion, was very critical of the IHAP and the people on it.

Can I just ask you to assist us with your understanding. I appreciate you don't have in front of you now the criteria for referral to IHAP or its jurisdiction to do whatever it did, but what was your understanding in the period 2014-2016 of what the IHAP did?---Look, the IHAP, when we introduced it, we were one of – and I don't want to go into a lengthy dissertation here – when we introduced the IHAP it was one of a handful in the, in the whole of New South Wales. We modelled ours after Sutherland, I think it was, and it may have been Botany, I can't recall. But the IHAP
30 was established and it was, as I said, very successful, very successful indeed.

But what did it do?---What it did was assess applications that were referred to it in accordance with a set of selection criteria – that I can't bring to mind right now – for referral to IHAP. Now, other people made that decision, would it be referred to IHAP or not, and if it complied with the referral criteria, the answer is, yes, it would be referred to IHAP.

40 And they assessed it and did what, as you understand or recall?---Well, there'd normally be a report from the officers, from the director in relation to the application. That would accompany any other documentation to the IHAP. And, yes, there'd be regular meetings, I think they were held on Mondays once a month, and when those meetings took place, they would assess – the IHAP, that is – would assess all information in its possession in relation to that application.

And then do what?---Then they'd make a recommendation to the council, which may or may not coincide to resemble that of the officers.

And was it your understanding that the process was that the planning division, almost always the director, wrote a report which, in essence, first went to the IHAP and then ultimately to council or the CDC?---My recollection of how it worked was, if the report of the officers and the report of the IHAP accompanied each other to the council meeting, and generally the council would say “as recommended per IHAP” or “as recommended per officer”. Now, in most cases the two were the same, weren’t the same, but both recommendations were accepted. Not always, but that was the normal procedure.

But the first port of call for the director’s report, for the officer’s report, was the IHAP?---Yes. Because it was a separate set of business papers established. It was managed differently. There were staff allocated to manage the IHAP process.

And the process, as you understand it, meant that, or involved the IHAP making its report and the director’s report would be amended by your governance staff to include the report and a summary of its recommendation.---Well, the report wouldn’t be amended. The report from the office would go up and the report from the IHAP would go up independently but together, of course, and sometimes they, they differed.

And what was the usual interval of time between the IHAP reporting and the meeting of the council or the CDC?---Well, they, they’d go to the first available CDC after the IHAP.

Well, what was the usual interval between the two?---The IHAP met once a month, on a Monday I think it was, so if, and we had committee meetings every second Tuesday. So generally speaking it wouldn’t be any more than a week or so before it was referred up to the CDC.

Now, can I take you back to the Harrison’s site and to the development application 592/214 to add to storeys to the approved development there. If I can ask to you assume that the proposal would have resulted in a building that was about 25 metres tall, when the applicable control for that site was a maximum of 18 metres.---I believe that’s the case. I can’t recall precisely.

And that’s a significant departure from that control, isn’t it?---Of course it is. Yes, yes, yes, it is.

Can I take you to an Exhibit 223, please. This is a set of papers which concerned the concept of a design review panel. I’ll be asking you a bit more about that later. In amongst those papers is a set of council minutes for the – I’m sorry, the business papers, sorry, for the meeting of council on 29 October, 2015 and at page 41 to page 45E is an agenda item, Independent Hearing and Assessment Panel (IHAP) Review. Do you see that on the page in front of you, that’s page 41?---Yep.

Sorry, if I can just pause for a moment. Actually, page 41 is minutes. You can see at the bottom there's resolutions, and going over the page, page 42 there's resolutions but if I had it right, yes, page 43 and following is the business papers touching on that agenda item.---Yes, that's right.

It's a report by Mr Sammut, the director of corporate services.---Yes.

10 And that's because the operation of the IHAP as you explained was dealt with by a different division.---Corporate services. That's right.

Now, halfway down you can see the word "report" and after that you can see that there is a report that commences, "The IHAP has prepared its annual review report of its operations at Canterbury. The IHAP believes that its operating procedures are most effective and support provided by council staff is invaluable." And then if we go on we can see that actually the whole report from there on has plainly been written by the IHAP itself. It's not a report by Mr Sammut except that he is providing that report in his report in the business papers.---I can't be certain of that but that, that sounds right to me that he got that information from the IHAP itself.

Now, at page 45 about two-thirds of the way down the page, under the heading Exceptions to Development Standards, noted that "There had been an increased use by applicants of clause 4.6 of the Canterbury LEP to support an exceedance of development standards used," I'm sorry, "set by the LEP. They expressed the views," this is the last paragraph on that page, "that local planning policy and planning controls contained in the LEP and the DCP should not be easily put aside because they have been through a statutory process involving public exhibition and the consideration, detailed and extensive, of public comment."---Yeah.

And then two sentences after that, third line from the bottom, "IHAP states that it is difficult to see how the public interest can be served when a range of such concessions are sought by an applicant and that better planning outcomes will be achieved as a consequence." The requirement for better planning outcomes to be achieved was one of the criteria set in clause 4.6 if I could remind you of that at this stage.---Yeah.

40 Gong over the page, to page 45A, "The IHAP draws this important matter to council's attention in order to avoid a situation whereby applications for exemption from development standards are seen as 'common practice' rather than 'exceptions'. The panel understands that some exceptions to development standards may be justified. However, the panel would not like to see a gradual erosion of council's rigorously determined development standards to the detriment of the public in general and having an adverse impact on neighbouring properties leading to a reduction in liveability for the purchasers/occupants of individual apartments in particular." Now, at the time that report was considered by council at its meeting on 29 October,

2015 did you have a view about any of those matters that I've taken you to in that part of the IHAP's review report?---I thought the review report was very good. It made a lot of sense and I agree with the sentiments expressed and I would have at the time.

Can I take you now to volume 22 in Exhibit 52 and to pages 68 to 110, and what I'm taking you to is Mr Stavis's report prepared for the IHAP but, as I think you understand or have accepted, also for council, or the CDC, after the IHAP has considered the matter. Do you understand?

10 ---I'm not sure I do. Is this the report that went to the IHAP?

This is in the business papers of the IHAP.---Okay. Well, that's right.

And the same document appears in the business papers of the council but with reference inserted to the IHAP, the outcome of the IHAP consideration of the DA.---That was pretty much standard practice with the IHAP.

At page 69, can you see that in the summary for the IHAP Mr Stavis recommended as the last dot point, "Notwithstanding the variations sought to building height standard," and you'll recall it was an increase from 18 to 20 25 metres, "the development application is recommended for approval subject to conditions." And then if I can take you over to page 70, there was information provided by Mr Stavis about what council had resolved in its meeting on 31 October, 2013, in respect of an increase to building height limits for this site. And in something like the sixth-last line he records that council adopted a 25-metre height limit. Do you see that?---Just one thing there I'm not clear on. I think it was referring to the Canterbury Road corridor, which obviously included that particular site, so it would have affected or could have affected any property on that Canterbury Road strip.

30 Thank you. You can see, however, he records the fact that council adopted a 25-metre height limit.---Yes.

And that at the meeting of council on 2 October, 2014, council resolved to adopt the planning proposal, which was then sent to the department for a Gateway Determination. He then recites how the planning proposal got hived off because of RMS concerns about that particular site and not wanting to hold up the planning proposal for the other sites in that corridor. And that is - - -?---I think there were also concerns expressed by the 40 Department of Health about exhaust emissions too. That was in the mix.

And then he recorded in page 71, in the middle paragraph, "Consequently council determined to omit a number of specific properties, including the subject site, from the planning proposal to allow resolution of the issues separately while proceeding with a range of other important amendments to the Canterbury LEP. The Canterbury LEP was formally amended in March 2015. There is no outstanding or active planning proposal by council that relates to this particular site. However, there is a council resolution to

increase the height limit on this site to 25 metres.” So do you understand that? There was a resolution but no planning proposal to take it forward.---I think that, I, yeah.

All I'm doing is drawing your attention to - - -?---Sounds, yeah, sounds right.

- - - the fact that that's what Mr Stavis reported to the IHAP.---I'm not sure I understand the nuances of all that but, yeah, that, that seems right.

10

Well, you can understand it's one thing for council to resolve to change the planning controls in the LEP, but there's a statutory process and ultimately the LEP has to be made, and unless it's delegated to council it's made by someone else. In the old days it used to be the minister.---That's right.

And so, you know, the law is the law, not the law as other people would like it to be. Do you understand that proposition?---I understand that, yes.

20

So the planning control that applied was not a height limit of 25 metres, but a height limit of 18 metres, and there was no current proposal before the department to change that because there hadn't been a proposal submitted for Gateway Determination, a part of the statutory process for effecting a change.---Yeah. I can't disagree because I don't understand it that well, I'm afraid. It was in, it was happening, it was internal. I wasn't involved in it.

I do need you to understand, though, or rather I do have to ask you, do you understand the difference between a council policy, on the one hand, and on the same subject, but having contradicting provision, the law?---Oh, of course. I understand there's, I understand, yeah, what you mean by that.

30

Now, can I just ask you to – if you'll just pardon me a moment. Can I take you to page 83 in this report, please, and it is headed at the top of the page The Variation Request, and Mr Stavis recited clause 4.6 as it applied to the site, and the request of course was the request of the proponent for a variation of the planning control as it applied to the site. And at page 85, having said at about, a bit above the halfway point on that page, “Having regard to the above matters and clause 4.6, subclause 3, the applicant's written request has satisfactorily addressed the matters required to be demonstrated by subclause 3.” Then if you can go down but on the same margin, the paragraph commencing, “In addition”.---Yes.

40

“In addition,” Mr Stavis said, “strict compliance with the height standard as it currently stands is not in the public interest, given council's stated intentions for the Canterbury Road corridor.” Do you see now how the resolution of council, the policy of council is being used by Mr Stavis to argue that clause 4.6 should apply to vary the control?---Oh, I guess that's what you can conclude from Mr – he wrote it. I mean, I, I don't know what was in his mind when he was writing that report. It's not, it's not my report,

and as I said, I don't, I don't fully understand, you know, the, the nuances of that, that, that 4.6 control and whether it, what he was asking would satisfy the, the standard or not.

If I can take you to page 94, and a bit after halfway down there's a paragraph commencing, "The proposal is consistent with", and this is the proposal to allow a height of 25 metres, as against 18 metres. "The proposal is consistent," Mr Stavis said, "with both council's stated policy intent and previous resolutions to pursue increased densities along the Canterbury
10 Road Corridor and SEPP 65," that's one of the planning laws, "as assessed above, and the clause 4.6 submission has demonstrated that the development satisfies the relevant statutory planning matters." Do you see that?---Yes.

Now, even if the resolution of council in October 2014 to change the building height limit as it applied to that site from 18 metres to 25 metres had been embodied in a planning proposal that had gone forward to the department and had actually received Gateway Determination but had not yet resulted in a change to the LEP, do you think it was an appropriate
20 approach for Mr Stavis to take to the application of development controls that weight should be given to a council policy in the circumstance that it hadn't been made law?---Well, clearly Mr Stavis thought so, and I, I really don't want to venture an opinion about that because it could be completely wrong. I, I don't understand, you know, what was going through his mind or what his interpretation of the controls were, and clearly when the report reached the council at some stage, or even the IHAP, I guess it was up to them to make those sort of inquiries and to satisfy themselves that there was no breach. I, you know, I wasn't writing, I wasn't in his office writing his reports for him. He, he, he was a senior officer who had a responsibility to
30 manage the planning function, and that included not only run-of-the-mill DAs, whether they're major or minor DAs, but also all of the policy decisions that the council had to make.

But policy decisions that had to be made by council were a matter of interest, if not concern, to you, were they not - - -?---Not really.

- - - as to how the law was being applied or how it was suggesting it should be applied?---Look, Mr Buchanan, I relied on the senior staff to do their jobs thoroughly and to report to the council without fear or favour, in the best interests of, of all concerned, and to respect the policies of the council
40 and also the planning controls introduced by the State Government, and I accept that you can't just flout them, you know, willy-nilly. I don't know whether that's what happened here or not. The 4.6 application Mr Stavis is saying satisfied the requirements. Well, I wouldn't have any reason to doubt that if that's what he said.

You'd appreciate that the practical effect in individual cases of taking the approach that was argued for by Mr Stavis in those passages of his report

for the additional two storeys at 548 Canterbury Road was that council could override a planning control in the LEP by passing a resolution.

MR ANDRONOS: Can I just ask my friend to clarify whether he's asking the witness to express a view as to whether he accepts it now or whether that was his view at the time.

MR BUCHANAN: I'm actually not asking that yet. I'm asking whether he understands this.

10

MR ANDRONOS: I thought you said "accept". Sorry.

MR BUCHANAN: I'll reframe just to make sure. Do you – I might have said "accept". I apologise. Yes, I think I did. Do you understand that the practical effect in individual cases of taking the approach for which Mr Stavis argued was that planning controls in the LEP could be changed by resolution of council and nothing more?---No, I didn't understand that. I didn't understand that and I don't now. I thought the LEP was sacrosanct and that to get a change in the LEP you had to get departmental approval, unlike the DCP.

20

But the practical effect of the position for which Mr Demian was arguing, and which was accepted by Mr Stavis and argued for by him, was that the planning control was not changed, it's just that council could resolve to do something different and it would be that which would be implemented in a determination of a development application in respect of that site, rather than the planning control in the LEP.---Yeah, look I, yeah, I understand what you're saying but I've got, but I can't assist the Commission any more. I don't know. I, I didn't understand it. I, I wasn't intimately involved in it. If Stavis or somebody else – say the mayor or the council – had concerns about that, they should have, they should have raised them, and perhaps he, there should have been a discussion at some other place about, about the sort of thing you're saying, is this a risky - - -

30

That's why I took you to the IHAP review because they did discuss it. ---Well, they may have, but as I said before, they're an independent body. They operate entirely independently of the council.

And they reported to council on it.---Yes.

40

And it's not something of which you were aware, that this was raised as a matter of concern?---No, I, I did not inject myself into the IHAP proceedings whatsoever. In fact I - - -

This is not a matter of proceedings. This is a matter of policy.---Well, even so the policy is determined by council, not by me.

Wouldn't you be concerned if the instrument that governs planning and development in the local government area for which you have responsibility is being avoided?---Of course I would have if it was demonstrated to me that that was happening, right. All this was happening in somebody else's office. There were discussions. Who knows who was involved in the discussions? I relied on the director of city planning and his highly qualified staff to advise the council appropriately on all of these issues, any variations to the, to the LEP or request for variations to the LEP via 4.6 or any other mechanism.

10

So the IHAP drawing the attention of council to deleterious consequences for the council and the local government area of this practice wasn't a matter that ever came to your knowledge?---No. Not in, not in those terms, no. The IHAP was independent of the council - - -

Yes, but it was reporting this matter to council.---Yes, as it had a right to do. If it, well, actually it was, I guess it was a little bit odd that they did that but they must have felt very strongly about it, and what I would have expected, pardon me, is if the council has actually read that that they, they'd be concerned about it, obviously.

20

Or if the general manager actually read that - - -?---No, it's not - - -

- - - he would be concerned about it.---Yeah, but there's nothing really I could have done about it other than to perhaps discuss it with the mayor and say, look - - -

Or discuss it with Mr Stavis?---No.

30 Why wouldn't you discuss it with Mr Stavis?---Why would I?

Well, if you say you rely on the director of planning to ensure that the law is complied with and no evil is done and yet a suggestion is being made that, look, there is a problem here, why wouldn't you take it up with your director? Isn't that your job?---No. Look, I didn't have the same level of surveillance in relation to the city planning, city works director or the city corporate services director. I let them do their job because, as I say, in the end the reports go through to council.

40 But you didn't let him do his job, did you?---Of course I did.

You frequently called him in for meetings with developers that you were having.---Well, that's a different issue.

Whether Hawatt and Azzi were present or not.---That's a different issue.

Well, how is it a different issue? You're talking to us about the extent to which you exercised supervision and scrutiny of what your director of planning is doing.---No, I didn't use that - - -

And you're saying essentially he was off on his own, he could do anything he liked.---No, not at all.

10 But the fact of the matter was in individual cases you were exercising supervision and scrutiny, weren't you?---Mr Buchanan, you were talking about the operation of 4.6 in relation to the site on Canterbury Road. Now it's more about a much broader allegation, if you like, against me. I did what I thought was the best thing at the time. I had no involvement with the day-to-day operations of the planning division but I relied on the – and I didn't. You can, you can screw your face, but I didn't. And the point is that those reports and the IHAP all went to council in the end so, and the council is the governing body. The council is the policy maker, not the general manager, not the director of city planning, as much as they might like to be at times. The council is responsible for policy formulation.

20 But the difficulty with the evidence you're giving is that the Commission has evidence from a number of different sources that you involved yourself in how particular applications were progressed.---That's a different, that's a different thing entirely.

30 Why is that different?---Look, I've said earlier I saw my role as trying to facilitate outcomes for the entire community. If it was a developer or a mum-and-dad applicant if I, if they asked for my assistance I would offer it or try to render assistance. I did that frequently and I don't deny it and it would be no different with this application, but when it came to the technicalities around the application of the planning controls – which I am not expert in by any means – when it came to that, I left that up to the experts.

40 But you didn't. You sat there while Mr Demian was trying to get Mr Stavis to agree to an FSR which exceeded what council had resolved upon, and Mr Hawatt and Mt Azzi were there and you essentially told Mr Stavis to get on with it and provide, I won't use the word solution, but an outcome which would deal with the matter. Now, that's quite at odds, isn't it, with the evidence that you're now giving.---No, no. I don't think so because I didn't know what the outcome was going to be. He may have recommended against the increase in height. He may have done that in relation to many other sites on Canterbury Road.

But why did you allow yourself to be involved in that instance at all if you had the position in relation to supervision and scrutiny that you have said today? Why didn't you tell Demian, "Don't talk to me. I've got other things to do"?---Look, it's not uncommon for general managers to involve – perhaps it is more uncommon these days because things have changed a lot.

But what's the purpose of that? What's to be achieved by you involving yourself?---To provide assistance with the director of city planning to achieve certain planning outcomes, and that's what the council wanted. They wanted Canterbury Road uplifted, which it is in grave need of in my view, and, and I recall saying earlier that I know the area very well, I grew up there, and I could look at Canterbury Road and nothing had changed and I compared that with neighbouring councils. So, of course I had an interest in making sure the areas had a bit more vitality about it but I didn't - - -

10

Don't you understand that your evidence of providing assistance, as you've described, is at odds with the evidence you gave five minutes ago- - -?---No, I don't think so.

- - - that you did not involve yourself?---I, no, look, you're, you're being very selective.

20

MR ANDRONOS: I object to that. What we have here are two distinct concepts being conflated. I think, with respect to both the cross-examiner and the witness, they are talking about different things and I don't think either appreciates that the other is not talking about the same thing they are talking about.

THE COMMISSIONER: Well, that's not my impression. My understanding is, well, the impression I've got is Mr Montague has given two answers which, Mr Buchanan's put to him, do not appear to be consistent, and I'd like Mr Buchanan to continue this.

30

MR ANDRONOS: Well, one deals with process and the other deals with an analysis of the application of the law. They are, in my respectful submission, different things and ought probably be addressed differently.

THE COMMISSIONER: Mr Buchanan, can you continue your questions, thanks.

40

MR BUCHANAN: Commissioner, please, if I can respectfully indicate to the Commission, I will be going a bit further but the evidence is there. I intend making a submission on it to the effect of what I just allowed the witness to respond to. My friend can put a different submission if he sees fit. Now, what I need to ask you, Mr Montague, is whether the approach that Mr Stavis was taking in this instance was something which, as you understood it, at the time or afterwards, was being done because it was one of Charlie Demian's projects? That is to say because of the identity of the proponent.---No, I don't, I, I don't know.

You took an interest in Mr Demian's projects when they came to council, didn't you?---I, I took an interest in all major projects, particularly in the

Canterbury Road precinct, because I saw that it would produce, it, it would achieve one of the overarching objective of the council, to enliven the area.

You were concerned to ensure that Mr Demian by and large, got what he wanted?---No. Not, not at all.

10 There's a notable exception, I'll be taking you to it later and you've adverted to it already, but by and large you made it clear to Mr Stavis that if Mr Demian had a project, then it should be progressed and progressed with expedition.---All, all projects, all developments, all proposals needed to be progressed.

Progressed favourably to Mr Demian?---No, not at all. I reject that. I don't understand the planning controls well enough to say whether it's favourable or unfavourable. I know the difference between six and eight storeys, and I would have said to Stavis, look, if the thing, if the thing, if eight storeys is permissible on that site, fine. If it isn't, say so. That's what I expected him to do, do his job, not to favour anybody.

20 And what do you think Mr Demian's attitude to you would have been, knowing Mr Demian, if that was the approach Mr Stavis took? Do you think he might have called a meeting with you?---Possibly, I don't know.

You knew Mr Demian.---I knew him, yeah. He's an acquaintance, that's all.

You knew the type of, you knew the manner in which he operated.---Yes, yes.

30 You know he would have called a meeting with you, don't you?---Possibly. Would I agree to the meeting in those circumstances, I don't know. It's sheer speculation.

And Mr Demian had a forceful personality, didn't he?---He could at times, like a lot of us.

Did Mr Demian scare you at all ever?---No, not at all. Not in the slightest.

40 Can I take you then, please, to the same volume, page 47. This is volume 22. Now, it's just so that you can see the front page. I'm sorry, just make sure I've got the right one. It's the business papers for the IHAP. Yes, page 118. And I should just indicate, I don't think in my summary yesterday of the various steps and events that occurred in progressing the 548 Canterbury Road DAs that at the time the DA for the additional two storeys was lodged around that time, Mr Demian also lodged a section 96 application for amendments, appropriate amendments to the approved development, such as additional car parking, that sort of thing.---Fair enough.

And that's simply to answer a question that might be in your mind, "Why are there two DAs there?" That's what the DA with the A at the end of it is. You understand that?---Yeah.

10 This document, sir, is the report or a letter by the IHAP to Statewide Planning, the planning company which Mr Demian used, in respect of the DA for two additional storeys for 548 Canterbury Road. And can you see that at the bottom of the page the panel said it was advised "There was no current proposal to include this site in any planning proposal to increase the height controls. This history indicates that the council resolution would only be relevant as a policy which, without further consideration by at least the RMS, must be given little weight in the determination of these development applications, one of which breaches the height limit," sorry, "the 18-metre height limit significantly." There's previous comments from the RMS included and then he, sorry, the IHAP set out an extract from an objection that had previously been given by the RMS to the proposal to increase the height limit. And then if I could take you, on page 119 still, to the third-last paragraph. It's an indented paragraph. "The panel also notes that it was not satisfied with the justification for a variation of the height under clause 4.6." You see that?---Yes.

Now, can I take you to another aspect of the IHAP report, and it's adverted to in the middle of page 119, "In addition, the panel is of the opinion that the council cannot legally determine the development application until both the development application and the section 96 modification application have been referred to the RMS under clause 104 of the SEPP, either because the DA/section 96 is for new premises or because they propose an enlargement or extension of existing premises." Now, you knew that concurrence was required of concurrence authorities identified in a State Environment Planning Policy in cases to which those policies applied.

30 ---In broad terms I knew there were referrals that had to be made.

And classically concurrence authorities were the RMS and, in cases when you were somewhere near a railway line, City Trains.---Yes. They'd be one of the, one of the many referrals.

And you'd accept from me, would you, that the reference to clause 104 of the SEPP required the referral, and that absent the referral the consent authority could not legally determine the application, that is to say, because to determine the application the consent authority, council in this case, had to consider any submission of the consent authority?---So your question was?

40

The law required, the SEPP required that there be a referral and that until the consent authority came back with their response the consent authority couldn't take into account the response by the consent authority and could not determine the development application until it had considered the

response of the concurrence authority?---I can only assume that that conclusion is correct.

It makes sense to you, doesn't it?---Well, it seems to make sense.

But you understood how concurrence worked?---Yes, of course I do.

10 When did you become aware of this IHAP recommendation?---What IHAP recommendation? I've never seen this letter before by the way. I've never read it before until now.

All right.---I don't, what recommendation are you referring to, Mr Buchanan?

Well, the report said that, in the middle of the page 119, "Council cannot legally determine the development application until the DA and the section 96 application have been referred to the RMS."---Okay. Fine.

20 When did you become aware of that?---I don't know that I ever did.

Right. Were there any processes or systems at Canterbury Council to draw to your attention an issue like that?---No. As I said - - -

No processes or systems?---No. I'd rely on the director of city planning or the planning division to take appropriate action in relation to advice like that and escalate it to the council in the reports that followed.

30 Weren't there meetings that you took part in along with the directors to canvass agenda items - - -?---Yes.

- - - for meetings of council on the CDC?---No. There were two meetings regularly. One was the officers where we'd coordinate on the business papers and we'd look for things that needed to be perhaps changed in terms of the council's legal and financial circumstances. The other was a meeting with the mayor before the City Development Committee meeting where we'd brief him and he could ask questions of the senior staff.

40 A meeting of the mayor only?---With the mayor. No, the mayor and the senior staff.

And the senior staff?---Yes.

And you said the CDC in his case. Is that right?---And the council meeting. Every meeting - - -

Oh, and the council meeting.--- - - - we'd coordinate with the mayor.

So I just want to check. These two meetings, one was the officers that considered the business papers for the council and the CDC as the case may be?---Yes, anything that went to council.

And then there was a second meeting of the mayor and senior staff - - -?
---Yes.

- - - that again considered matters going to the CDC and to council as the case may be?---Yes.

10

Did you take part in both meetings?---Of course.

And so - - -

THE COMMISSIONER: When you say officers, that's - - -?---This is the contracted staff, the directors.

20

So officers, directors, and also senior staff are directors?---Senior staff and directors are one and the same. They're the contracted staff. But we'd sometimes have other people depending on the nature of the report along to assist. It could be a manager, somebody like that.

MR BUCHANAN: The business papers of council and of the CDC were published on the council website?---Yes.

How soon before the meeting - - -?---I think the day before. I, I can't recall.

30

In any event, the document I've just been showing you, commencing at page 188, volume 22, is a letter to Mr Demian's company that was looking after this particular DA. And so you'd expect Mr Demian to have become aware, at some stage, between the meeting of the IHAP and the writing of its report on the one hand, and the preparation of the business papers for the CDC meeting?---I may have misspoke. The business papers are prepared in the corporate service area for these, all of the committees, the standing committees and the council. They're sent to the councillors by courier or in some cases electronically. The Friday before the Thursday meeting, that's the next Thursday, right, so the documents are placed on the website, probably on the Monday following their dispatch because the councillors get them first. So, just to clarify that. So they, they'd probably be on the website for two or three days before the actual meeting.

40

But in any event, what did happen is that you and the relevant director had the opportunity – if not one, then two opportunities – to review the business papers that went to the council or the CDC as the case may be?---Yes, but I didn't do that. I, I, I relied on the process, which was to have a coordinating meeting with the staff and then a meeting with the mayor to brief him on the business papers. I didn't change the business paper. There, there could be changes but they'd be changes that would be consensual by the entire group

in relation to a particular director's report and they were routinely minor things.

And when you say changes, changes to what?---Well, if, as I said, if it involved a financial, if there was a financial implication or there was factual errors in the reporting that everybody agreed were obviously or existed, they, they could be changed before the business papers went out to the councillors.

- 10 And if the material that was to be included in the business papers, as in this case, included an opinion that council couldn't legally determine the agenda item, then is that a matter that came to your attention?---No, but I would have expected it to be advised by the director, either at the coordination meeting or in his report. I mean, it, it, it should have had a flag on it, a red flag obviously.

So did Mr Demian approach you at all? Did he have any contact with you about what the IHAP had said in its report?---No. Not that I recall.

- 20 Can I take you to the last paragraph on page 119. Having said that council couldn't legally determine the DA until the RMS' opinion had been sought, and having said that that it wasn't satisfied with the justification for a variation of the height under clause 4.6, the IHAP said, "Consequently, the matter will not be submitted to the City Development Committee on 3 December as previously advised. Instead, it will need to be reconsidered at a future meeting of the panel." Do you see that?---Yes, I do.

Is that the sort of thing that you would have had drawn to you attention?
---Oh, look not necessarily but if, if, if that led to - - -

- 30 What sort of system are you running - - -?---I beg your pardon?

- - - for the supervision of the papers that are submitted to council if you didn't have a system that you would have expected to have drawn to your attention statements like those three statements that I have just drawn to your attention on page 119 of volume 22?---Look, I, what sort of a system was I running?

- 40 If it wouldn't have drawn to your attention the statements that I have drawn to your attention on page 119.---There were systems that had been operating for many years very successfully.

That's not an explanation. The question is, are you saying it could easily have been that this would have slipped through and gone to council, notwithstanding what the IHAP had said in writing?---I don't believe so. It shouldn't have. It could have. I don't know. Do you know how many items of correspondence comes into that council every day? If I'm going to check

every one of them, they should change my title to correspondence clerk, not general manager.

10 And so what you're saying is you didn't scrutinise or supervise the contents of the papers that went to the CDC or to council, and you didn't know whether you had a reliable system for drawing to your attention anomalies or legal defects in council actually making a decision on a particular agenda item?---I won't agree with that because in the legal team downstairs, in the corporate services area, they did scrutinise things and I had one particular individual who was very fastidious in the way he went about things, and he would have drawn attention to it had he seen it, and it would have then escalated to the meetings, the coordination meeting.

Who was that person?---A fellow by the name of Chris Lenard.

Was he in corporate services?---Yes.

20 And Mr Brad McPherson was - - -?---Yes, he was in charge of the preparation of the business papers, McPherson, including the IHAP business paper.

So did Mr Demian have any contact with you about what's recorded there, what the IHAP had said?---Not that I recall, no. No, no, no. Not that I recall. I doubt it very much.

30 Why do you doubt it very much?---Oh, dear me. Because I do. I can't, look, Mr Buchanan, I'm sorry, but I can't continue to play these word games with you. I said I doubt it. That's it. I can't explain why, but it wouldn't be likely that that would have happened.

THE COMMISSIONER: Mr Montague, it's not word games. Mr Buchanan is asking you questions which will assist me in providing eventually my report. They're not word games. They're questions where the answers will assist me. So - - -?---Okay, well - - -

- - - please try and answer the questions.---I will do my very best, Commissioner. I promise that.

40 MR BUCHANAN: What do you think would have been, in all likelihood, knowing Mr Demian, his reaction on learning this?---Oh, dear me. I don't know what his reaction would be. He might have been having a good day or a bad day. He might have lost money on a horse the following, previous weekend. He could have been angry. I don't know. I'm not inside the man's head. I can only deal with – when people confront you when you're, like even now with you, you can only interpret things then. I don't know what went through his mind, how he would have reacted.

But you knew the sort of person he was.---I don't know what you mean by that. We're all different.

And you knew, didn't you, that he had a keen interest in progressing his applications to a successful conclusion as quickly as possible at Canterbury.---Of course. Like, like any other developer or any other applicant would.

10 And in that case, knowing the sort of person he was, aren't you in a position to assist us by saying whether or not he would have regarded that outcome, as reported there by the IHAP, as water off a duck's back or whether it would have been explosive?---I can't answer that question. I, I don't know. I don't know what went through his head. He was a very excitable individual at times, but then a lot of us are.

What do you think would have been Mr Hawatt's reaction?---Ditto. I don't know.

20 What do you think Mr Azzi's reaction would have been?---Well, again, a very excitable human being. Maybe he would have been angry. I don't know. They didn't discuss it with me. They didn't ring up and say, "Jim, we've just read this. This is ridiculous."

So they didn't ring you?---No. Not, not in relation - - -

How do you know they didn't?---Not in relation to that specific piece of correspondence.

30 That's what we're talking about.---No, I, well, I believe they, I had no contact with them about that at all. They, they would more likely have contacted Stavis.

And why would they have more likely contacted him?---Because he's the director of city planning. I'm not.

Yes. But he has already written his report.---Yes.

40 What can the director of city planning do, having already written his report?---Well, I suppose he could have, he could amend the report if he had a mind to. I'm not suggesting he did or he should, but he could, and they may have asked him to do that and he may have refused.

But the report was in the hands of corporate services, wasn't it?---Yeah, but the reports, we're in the one building. We're not, you know, on different islands somewhere. We're in the same building, so it would be entirely appropriate for him to ring down to McPherson or Lenard and say, "Look, you know that report on whatever it is? Can I have another look at that,

please?" It's his report. They're not, you know, they're not set in stone as soon as they pass from one division to another.

So, it was within the power of Mr Stavis, as far as you were concerned, to pull the agenda item, to pull his report from the agenda of the CDC meeting?---No. It's, well, if, if he thought the report was deficient, the answer is yes, if he wanted more, if he reconsidered and thought, jeez, I haven't got that right, I'd better go back and do it again, of course I'd expect him to provide the most reliable and accurate and upstairs to date information he could in those reports to council. Of course I would.

Excuse me a moment. Can I just give you this information. The meeting of the CDC was held on 3 December, 2015. So, it's sequencing the events chronologically that I'm directed to at the moment, and the meeting of the IHAP, which deferred the application until it had been referred to the RMS, was held on 23 November, 2015. On 24 November, 2015, the IHAP considered DAs for another development altogether, namely the Chanines' development at 212-222 Canterbury Road and 4 Close Street, and it recommended that those DAs be refused because of the extent to which the proposals exceeded the permissible FSR, and they said the clause 4.6 submission didn't demonstrate that the controls were unreasonable or unnecessary or that any other aspect of the clause 4.6 requirements were satisfied. So I just ask you to keep in mind that there are DAs proceeding together, almost, in time. Can I take you back not to this particular one, the additional two storeys on the Harrison's site. On 27 November, the IHAP report - - -?---Is that 2015 or - - -

I'm sorry, yes, it is 2015, that's exactly right. So, the IHAP sat on 23 November, generated that report that I have taken you to. On the 27th - can I take you to volume 27, page 28. This is an email from Mr Stavis to Ms Sutcliffe. Does she work in your office?---Corporate services.

Oh, thank you.---But she filled in for my PA when she was away.

Thank you. And CC'd to you. Can you see that?---Yes.

And can you see that the subject matter is, "IHAP reports 212-218 and 220-222 Canterbury Road, Canterbury, Bowermans DA and Harrison's DA".
---Yep.

So it's about three different matters. The date of the email is 27 November, 2015 at 9.07pm. "Hi Andrea. The GM wants to meet with me urgently on Monday to discuss the above."---Yeah.

Can you assist us as to what it is that Mr Stavis was talking about there?
---No, no, I can't. In relation to the Close Street property, particularly I, as I said earlier here, the only issue I knew about in relation to Close Street was the setback on the eastern side.

You didn't know that the IHAP recommended that DAs be refused - - -?
---No.

- - - for exceedance of a planning control, namely the FSRs?---Not that I recall, no. And as I said, if that's how the officers reported or the IHAP reported, that's their prerogative. I wouldn't interfere in that. They'd put it up. Council would do what they like with it.

- 10 Nevertheless, Mr Stavis seemed to think that you wanted to talk to him about - - -?---I can't recall , yes - - -

- - - the 212 and the Harrison's DA, and as at 27 November, the situation was that there were two IHAP reports which were significant obstacles to the DAs being considered, let alone determined.---Maybe I just wanted some more information about it. Maybe I had received inquiries from people about it. I don't know. But it was in the hands of the IHAP. There was no way I can intervene in what IHAP was doing.

- 20 But it wasn't in the hands of the IHAP. They had reported. The next step was council or the CDC.---And I mentioned the reports went to council in their original form.

You wanted to meet with Mr Stavis urgently, he has said, on the Monday after this Friday to discuss those.---Yeah, I, I would have, yeah, probably to get additional information as to why the thing was, particularly in relation to that setback against the bowling club, because there were concerns being expressed about that, about that site in general, the bowling club.

- 30 Who was expressing those concerns?---Well, the community. There, there, it was a, it's a large site. They may have become aware of the fact that it was going to be overshadowed possibly by a high-rise development, who knows, but there was a lot of interest in that particular site because it was seen as open space, as green space.

So you don't have a recollection of having any contact with the Chanines or either of them?---No. No. Not in relation to - - -

- 40 Sorry, in relation to - - -?---The Doorsmart, or Doorsmart - - -

Yes.---No, no. But there was one meeting I had. I remember, I don't know when, I believe it was in the, in the conference room on the first floor. I don't know who was there but it was about the setback.

Well, you can see, even though you don't have a memory of it, that you were concerned - - -?---Well, I've said repeatedly - - -

- - - about the IHAP reports in those two cases.---No, no, I couldn't, couldn't care less what the IHAP said. That's their prerogative.

Is there anything else, though, that you can assist us with as to why you would have wanted to have met urgently with Mr Stavis on the next business day about those two?---Only, only, as I said, to get advice. Maybe I had received calls from councillors or even the mayor what's going on with these two, I don't know. I've got no idea now. And we're talking when? When was this? '15. Yeah. Three years ago. I, I, I don't remember.

10

Would this be a convenient time, Commissioner. I'm about to move on to the next stage.

THE COMMISSIONER: Yes. All right. We'll have the morning tea adjournment and resume at 10 to 12.00.

SHORT ADJOURNMENT

[11.29am]

20

MR BUCHANAN: Mr Montague, you had powers to intervene in council's determinations or consideration of planning matters, I want to suggest to you, one being to circulate a memo to councillors and the other being to add an item to the agenda of the councillor CDC meeting as a late item.---Well, if that's intervention, yes. I see it as normal, I see it as normal procedure.

30

Yes. So that's simply, I suggest to you, an acknowledgement that you did have those powers, and to the extent that they involved an intervention, it was normal.---Well, yes, I think, I think you could say that, that it was certainly traditional or customary for, in discussion with the mayor, if it meant another item on the business paper, I'd always raise it with him as a courtesy, of course, but otherwise, no, I, I didn't, I didn't intervene in the, I didn't intervene to get certain reports. There may have been one or two occasions where there were time pressures, where the council had made it clear they wanted the thing back to the next meeting, which is not unusual either, and, yes, I would have probably intervened in that case to, to try to ensure that it did reach the council by the due date, when they expected it to be back to the meeting. But that's, that's just routine procedure. There's nothing unusual about that in my opinion.

40

Can I take you, please, to volume 22, page 125. This is in relation to 548 Canterbury Road, the Harrison's site, and it's an email from Mr Stavis to Andy Sammut on 30 November, 2015, at 10.53am. So 30 November was the Monday after the Friday on which, late at night, Mr Stavis informed your staff, Ms Sutcliffe, that you wanted to meet with him urgently about three matters, two of which involved IHAP reports, which would have, if adopted, prevented DAs being approved, or in one case considered, at the subsequent CDC meeting. So it would be reasonable to infer that Mr Stavis

did indeed come up to your office early on the Monday 30 November, 2015, having regard to that email you saw earlier. You'd accept that?---Yeah, possibly.

And if at 10.53 Mr Stavis told Mr Sammut, "The GM wants this DA to go to the 3 December CDC meeting," that he was relaying something he told him to do?---Possibly.

10 You did interfere in planning decisions at council, didn't you?---No. I wouldn't use the word interfere. We don't know what the circumstances surrounding this were. There may have been an expectation on the part of the council that that report would be on 3 December. I do remember occasions when, notwithstanding the fact that the council hadn't even resolved, it had come back at a certain meeting, planning staff would just shrug their shoulders and say, "We'll get it up when we can," and that caused me to dig in and say, "Look, that's what the council wants. You just do it."

20 There's no material to indicate that that occurred in this case.---No, not in this case.

The surrounding circumstances we know were the IHAP reports, which essentially prevented the council from going any further on the matters, and the fact that these were proponents who had been in contact with you, Charlie Demian and the Chanine brothers, and that they were proponents who were liaising with Mr Hawatt and Mr Azzi to progress their applications.---Well, they could have been.

30 MR ANDRONOS: Well, I - - -

MR BUCHANAN: That's what we know about the surrounding circumstances.

40 MR ANDRONOS: I object to one of the components of that composite question, which is, it was put that we know that Demian and the Chanines had been in contact with Mr Montague. I don't know that the evidence establishes that in this period that we're talking about, there had been such contact. If it's there and I've missed it, I apologise, but I'm not sure that we know that.

MR BUCHANAN: I press the question, Commissioner. There is abundance of material. I have yet to come in detail to 212-222 Canterbury Road, but it is clear that the Chanines were in contact with Mr Montague. Indeed, it might be recalled from my opening that I indicated that there was communications between Mr Stavis and this witness which indicated an understanding on Mr Stavis's part that Mr Montague had a relationship of some sort with Marwan Chanine, and we have the evidence of the Chanines, particularly Marwan Chanine, that they had liaised with this witness.

There's quite a bit of material in that regard, but as I say, we'll be coming to 212 later.

MR ANDRONOS: At this time? In this period? I'll take your word for it. If it's in this period then I won't press it.

MR BUCHANAN: I think my friend is taking exception to the question so I'll have to break it up and it's going to take a little longer, but if that's so, then so be it. You had been dealing with the Chanines for some time about
10 212-222 Canterbury Road and 4 Close Street as at November, 2015, hadn't you?---I don't know what you mean by for some time.

They had a pre-DA meeting with you.---Well, that's not uncommon. Pre-DA meetings happen all the time.

You have been dealing with them - - -

THE COMMISSIONER: Mr Montague, sorry, can I just intervene again. What Mr Buchanan is trying to do because your counsel objected is
20 establish some facts. Now, he asked you, he put to you about a pre-DA meeting and then you in a sense responded in quite a defensive manner, nothing unusual about that. Now, what he's trying to do is just establish over the objection of your counsel whether you agree or not or whether you can recall that there was this contact.---Okay. Fair enough. I'm sorry. I'm sorry.

MR BUCHANAN: So in 2014 you had a pre-DA meeting with Marwan Chanine in relation to the Chanines' plans for development at 212-222
30 Canterbury Road and 4 Close Street, didn't you?---I don't recall the meeting.

You can assume that we have evidence of that.---Well, if you have evidence the meeting must have taken place.

And as far as you're concerned that sort of meeting was normal. Is that right?---Pre, pre-DAs were normal, yes.

Yes. With you.---No, not always with me.

With you.---No, not always but there were occasions - - -
40

So you accept that a pre-DA meeting with you was not normal?---No, I wouldn't say that either. I would sit in, if I had been approached and asked to, to be involved in it I may have but - - -

Why did you say a moment ago it wasn't normal for there to be a pre-DA meeting with you, the general manager?---I, I was involved in some meetings of that nature. This one was particular because it involved a council parcel of land as well at the back.

And is that what was canvassed with you in that pre-DA meeting? The relationship between the site the subject of the DAs to be lodged at that stage and the bowling club site?---I don't recall what was canvassed.

Well, why did you say that it was because of the interest that council had in the bowling club site?---That would have been my thinking at the time, that the council has an interest in that site at the rear and there's a lot of community interest in it as well, so it was one that to me was red-flagged.
10 You know, this, this is not going to be accepted necessarily by the community.

So you would have been astute to canvass with Mr Chanine the relationship between the two sites, if I can roll up the sites of the proposed development in the word "site"?---Yeah.

You would have been careful to explore with Mr Chanine the relationship between the bowling club site and the sites proposed to be developed?---I wouldn't say explore it. I'd probably, if it hadn't already been I would have
20 brought it to his notice that the council had an interest in that bowling club site at the rear.

And what would you have said as to how you wanted to see that relationship taken care of, the relationship between the two sites?---Well, sensitively so that the council wasn't disadvantaged in terms of the development potential of the bowling club site, and the council had already decided that they wanted to redevelop it themselves.

30 THE COMMISSIONER: Does that mean that you became involved either in the pre-DA meeting or any other meeting of your own initiative because of that interest with the bowling club site?---No. I didn't initiate the meeting.

No, no, no, became involved in any - - -?---Well, it was of more interest to me because of the council's interest in the bowling club site, which they'd already resolved – if memory serves me correctly – to redevelop.

MR BUCHANAN: So you did become involved in the progressing of those development applications at 212-222 Canterbury Road and 4 Close Street?
40 ---No, I became involved to the extent that it affected the bowling club site. I don't know what the outcome of those applications were or where they were at at that time. I knew there was an issue with the setback at the rear. That's the only thing I was aware of.

And at the pre-DA meeting did you canvass how the plans of the Chanines would impact on the bowling club site?---No, no.

Why not?---Well, I'm not - - -

Given that that was your concern - - -?---Yeah, okay.

- - - why wouldn't you have canvassed it with them?---Well, maybe I did. Maybe I said, look, you're not going to - - -

Well, why a moment ago did you say no?---Oh, look, Mr Buchanan, please. I, you're just confusing me. I, I had an interest in it because of the bowling club site. I knew there was an issue with the rear setback. That's it. That's
10 all I know about that development proposal. And I recall one meeting in the function room, or the conference room, upstairs where we discussed that setback. That was it. And if, and if, if I'm correct, Mr Stavis was present as well and perhaps some of his senior staff. It was a very important site.

So you can't recall the pre-DA meeting?---No.

But we can assume, from what you've told us, that you would have canvassed with the proponents the likely impact of the development proposed on the adjoining site?---Yes, I think that's reasonable.
20

And you would have then be told about how it would have impacted on that site?---I don't recall, the meeting I'm referring to, I don't think any resolution was reached. I think they felt that they could get away with a zero setback, and that wasn't going to happen.

But you're now moving to later on.---Mmm.

Just go back if you wouldn't mind. At the pre-DA meeting, if you had learned that what was proposed was a nil setback at the rear of the proposed
30 development, you would have said something, wouldn't you?---Of course.

And you would have, and the thrust of what you would have said would have been, "Well, that's not going to happen."---I could have said that. I, I don't recall. But it, it, that was my interest in that site, was the impact it would have on the, on the bowling club site and the ability of the council to redevelop that site as a stand-alone site. The bowling club, I'm talking about.

So you don't have a memory of being alarmed on behalf of council by
40 learning at any pre-DA meeting of an intention on the part of the Chanines to build right up to the common boundary between the proposed development sites and the bowling club site?---During, during that meeting that I referred to, that question was raised.

But at any pre-DA meeting, you don't remember being alarmed?---No, I can't recall that.

If you're telling us that your attitude to a zero setback is that it wouldn't have found favour with you - - -?---It would not, doesn't matter whether it finds favour with me or not. It wouldn't have found favour with the council either. I can't, I can't, look, if I, if I thought it was a good idea, that's me. It doesn't mean it's ever going to become a reality.

10 But you're the officer of council who is meant to be in tune with or understanding or alert to the attitude of the council as you understand it, and isn't that the sort of thing you convey if you thought that what was being put to you would not pass muster at council?---At that stage it was just an idea. It was a thought bubble. It didn't, and as far as I know it never went any further, and I don't know what the outcome was ultimately with that site, but it doesn't matter. No, look, that, I would have expected the implications of that – that is, a nil setback – to be reported in the normal way when, when the application or the proposal went to council, because it's a critical head of consideration, of course, and the legal team would be involved, the property team would be involved, the planners would be involved and there'd be advice given to the council, and the council would make the decision. That's how it works.

20

And you wouldn't intervene?---No. Why would I? There's nothing, nothing, it means nothing to me.

Well, you might intervene if you thought that council's interests were being unduly or improperly prejudiced.---Well, of course. I think, I'm sorry, the connotation I put on that, what you said then about intervene, was "for the wrong reasons". No, if, if, if I felt, if my legal team felt that the council wasn't getting the best outcome on that site, yes, of course, the council would be advised accordingly. That's what they're there for.

30

So you'd accept that it would be improper to have intervened to the prejudice of council?---Yes, absolutely.

Can I take you back, then, to 548 Canterbury Road, and at page 125 at volume 22. Can you assist us as to why, on Monday, 30 November, 2015, you told Mr Stavis you wanted the DA for the extra two storeys to go to the 3 December CDC meeting and for it to be circulated as a late item, notwithstanding IHAP's deferral request?---That's fine but the council would have had the benefit of the deferral request in, in the papers that went up.

40

Please, I'm sorry to interrupt, but that's not an answer to my question.---No, I was getting, I was getting to the answer. I can only assume that there was some interest from the council, perhaps, to get this one moving, to get it up to the council meeting at least.

How about an interest on the part of Mr Demian?---Well, it amounts to the same thing in a way.

And he was your friend?---No. He was an acquaintance, a business acquaintance. Now, it wouldn't mean necessarily that it would change the outcome, though. It's just clearing the decks, where, where, well, it's probably the last meeting of the year.

10 So you say, do you, that as best as you can assist the Commission, the reason why you wanted the DA to go to the 3 December meeting as a late item, notwithstanding IHAP's deferral request, was because someone would have said something to you?---Possibly.

Well, what other explanation can you give us?---I don't know. I suppose if I had time to think about it, I could come up with a couple, but here and now I can't.

Was that person Mr Demian?---I don't know.

20 Was that person Mr Hawatt?---I might have got a call from one of the councillors.

Was that person Mr Azzi?---Oh, I don't believe it'd be Councillor Azzi, no.

30 THE COMMISSIONER: You were just giving a couple of answers, when asked about why the DA, you gave the instruction, you said, "Look, it could be the councillor was interested in getting it moving." Then Mr Buchanan put to you or Mr Demian was interested in getting it moving and you answered, "That amounts to the same thing." What did you mean by that answer?---Well, if, if the councillor was Councillor Hawatt, for example, I, I would assume that councillor, sorry, that Mr Demian has contacted Hawatt. Now, that, but I don't know that but you can assume that, that he's contacted Hawatt, who may have contacted me or, or, me or Spiro as well, perhaps, and what I said earlier, I, I recall it, I don't know whether it was this application, but you've got to understand, you know, that it, how it worked. Some of the planning staff thought, well, it's not on our list of priorities, we'll just shove that to one side. That, that makes me angry when the, when the staff decide to ignore instructions.

40 No, I'm more interested in your answer really equates certain councillors' interests being, being the same as Mr Demian's interests.---Well, not necessarily, but what I said was that Mr Demian, who had, appeared to have a reasonable relationship with Hawatt, may have contacted Hawatt and said, "Look, you know, we're coming to the end of the year, can I get this one moving."

MR BUCHANAN: But what the Commissioner is asking about is your understanding was that Mr Hawatt had interests relevantly identical to Mr Demian's when it came to this development application, that you saw him

as an inveterate advocate for Mr Demian's project.---I don't know about inveterate but, look, he - - -

Committed?---I beg your pardon?

10 A committed and active advocate for Mr Demian's interests in relation to this DA?---But it's broader than that because, as I said way in the beginning of these proceedings, Councillor Hawatt in particular had a great deal of passion about developing the area and getting things in Canterbury Road and other precincts in the city fixed. Now, he, he, and he expressed to me more than once frustration over delays in the planning division on key applications, not just this one, but others, inexplicable delays it seemed to him. Now, they, they weren't inexplicable, there were good reasons for the delays, amongst a variety of reasons, but he wanted the things, he wanted things happening.

20 Did it not seem to you in the period of 2014-16 that Councillor Hawatt and Councillor Azzi had an interest in progressing to a favourable outcome all of Mr Demian's applications then before council?---Look, the easiest answer to that question for me is yes, but I can't be sure of it because I don't know what was motivating Hawatt. Any time I raised issues with Michael Hawatt - - -

That's really a separate question.---Okay.

It simply, it seemed to you in that period that Hawatt and Azzi could be relied upon to advocate for Mr Demian in respect of his applications?
---Well, I think Mr Demian believed that.

30 But you could see the behaviour of Hawatt and Azzi, couldn't you?---Well - - -

Did you not ask yourself why are Hawatt and Azzi sitting here in my room while I'm talking to Mr Demian about the planning proposal for 998 Punchbowl Road?---Well, that example I think, yeah, demonstrates that there, there certainly was. They saw, they saw, he saw the two councils as friends at court.

40 And so is it the case that there could have been contact between you and Mr Demian or you and Mr Hawatt or you and Mr Azzi, or any combination of those three third parties, that caused you to say to Mr Stavis on the morning of 30 November, 2015, "I want this to go to the 3 December meeting of the CDC as a late item"?---Yeah, could, could have.

Is there any other explanation you can give?---No, only that, as I said, the, we were approaching, pardon me, the end of the year. There were delays in DAs. There had been for a long, long time. There was a build-up of DAs,

we'd had a turnover of staff, and there wasn't the continuity I was looking for, so clear the decks before Christmas.

That in the absence of anything specific to the particular application might seem to be a relevant consideration, but in this email Mr Stavis said, "The GM wants this DA to go to the 3 December CDC meeting and ask for it to be circulated as a late item, notwithstanding IHAP's deferral request."

---Yeah, fine.

- 10 What that suggests is that you and he discussed the IHAP report and the outcome of it.---No, I don't believe so.

Well, you must have, mustn't you, talked to him about what the IHAP's report recommended.---But he'd know that anyway eventually when he got the IHAP business paper.

No, no, no, no. You must have discussed it with him - - -?---No, not necessarily.

- 20 - - - and what the outcome for the business of council in relation to this matter should therefore be.---Not necessarily. And in any event, as I said before, the two reports, the IHAP report and the officer's report, if it went to that meeting on the 3rd, or the CDC, and I don't know that it did, but if it did I couldn't have predicted the outcome, whether the council was happy with what was being proposed or not.

- 30 Mr Montague, you're just, if I can respectfully suggest this, ignoring the fact that Mr Stavis seemed to have it in his mind when communicating with Mr Sammut on the morning of 20, sorry, 30 November, 2015, that you knew about the IHAP outcome and that in order to avoid that outcome being implemented, you required that the DA be put on the agenda for the CDC meeting as a late item.---It wouldn't make any difference, Mr Buchanan, whether it went as a late item or it went to the first meeting the following year. The same material would be supplied to the council. It wouldn't make any difference at all.

- 40 What we're talking about is what you did and what you said. Rather than an argument in the abstract, we're talking about what we know happened and people's communications with each other. And I'm trying to ascertain, given that it's reasonable to infer that because Mr Stavis told Mr Sammut this, you said a particular thing, then the question is, why did you say that particular thing and what did you take into account in saying it? And one of the things, it seems clear, that you were taking into account – indeed, inferentially you were impelled by – is knowledge that, page 119, volume 22, the IHAP had said the matter will not be submitted to the CDC meeting on 3 December. Instead, it will need to be reconsidered at a future meeting of the panel.---Well, that's, that's the IHAP's opinion.

No, no, no. That's what you knew and that's what you were taking into account - - -?---No. I, I'm not - - -

- - - and it was because of that, because of that, that you were saying to Mr Stavis, "We're going to do something to prevent that recommendation from being implemented."---No, because the recommendation of the IHAP would still reach the council. They would still be aware of the IHAP's reservations.

10 The recommendation, and I might be underdressing it somewhat, was that the matter will not be submitted. You were the person who was overriding the decision of the IHAP that it be - - -?---Yes.

- - - not submitted and instead you were saying I don't care, it's going to be submitted.---Well, it may have been - - -

20 And the question in our minds is why did you take that position?---Because I said earlier there was pushback everywhere. The, the planning division wasn't functioning properly and I just wanted to clear the decks. Now, it wouldn't - - -

Why did you not take into account the reasons given by the IHAP for making that recommendation, if we can call it that, one of them being that the council cannot legally determine the application?---All that material needed to be reported to council. All of that information.

Why did it need to be reported?---Because they have to be apprised of that. They have to know.

30 With a view to what?---Well, making a decision.

With a view to doing something contrary to what the IHAP advised?---If that's what they had, wanted to do, yes. If that's how they felt.

40 And so you were happy if despite the IHAP which had a lawyer as one of its members saying it was not legal to do this, you were happy to put council in a position where it would do what you were being told and it would be told was not legal?---No, but we don't know what would have happened when it reached the council. Maybe - - -

You were happy for that potentially to happen?---No.

You wanted to engineer a situation whereby council could do something it was being told and you were being told was illegal?---No, not at all.

Why not?---No, because that's one solicitor's opinion anyway. We didn't get confirmatory legal - - -

So did you take steps - - -?---Maybe.

- - - to have that opinion checked by another appropriate lawyer?---I could have. I don't - - -

No, no, no, did you?---No, I don't believe we did.

Why in that case did you even say that, that that's just one lawyer's opinion?---Because it is. It's a fact.

10

You thought you knew better than that lawyer?---No. No, I'm no expert in planning law.

So why did you say to us a moment ago well, that's just one lawyer's opinion?---Because it is and those opinions are always open to question.

20

Yes, but why did you, what is the significance of telling the Commission that that was your thinking, that it was just one lawyer's opinion? What was the, why did you tell us that?---Because it's what I mean. If we'd had that, say, if we could just hypothecate for a minute. If the thing went to council with all the material it may well have been in the end that the council would have said or been recommended get legal advice on this before we proceed any further.

Why wouldn't you assist council by obtaining that legal advice so it could have the advice before it?---Look, oh, look, I, I can't answer any further. I can't, I've got no further explanation for it.

30

The problem is, can I suggest to you, that this is such an unusual course for you to have taken in all of the circumstances that it suggests that something else was going on that you're not telling us about.---No, there's nothing else going on.

It either suggests that you decided to advance the interests of Mr Demian notwithstanding without any contact from him or that you decided to advance the interests of Mr Demian after contact from any of Demian, Hawatt or Azzi or a combination of them.---No, no.

40

Can you give us any other suggestion as to why you would have taken the step that you did in the circumstances of being told it's not to be submitted because it would be illegal to determine it ensuring that it was submitted so that it could be determined?---No.

Can you give us any other explanation?---No.

Can I just come back to the question of why, given that you obviously knew about the IHAP's report and what it said because that appears to have impelled your direction to Mr Stavis, can we just explore why you didn't

take any step to have council's solicitors provide council with advice?---
Could have been any number of things. Could have been the timing.
Maybe, maybe I, I wasn't available. And I would have sent it down to the
legal team anyway. I wouldn't seek that advice myself. I'd ask Mr Lenard
or Mr McPherson to get some legal advice from one of our panellists, one of
our panel solicitors. That's what would happen. And as I said, that
information and the confirmatory advice would all be reported to council in
the fullness of time.

10 The difficulty is, sir, is we don't have any indication that you did that.---No,
I don't believe I did, I may not have done, I don't know, I can't recall, I
don't know.

If you didn't do that, as would appear to be the case from the evidence
before the Commission, then the question still is hanging in the air, why
didn't do you that unless you were trying to, and I'm going to suggest it,
improperly have a decision made by council that would benefit Mr
Demian?---That's just not true. That's never entered my head, and perhaps
getting that legal advice I may have requested it informally and it didn't
20 come through, I don't know. All this happened in 2015.

Yes.---Well, I'm afraid the memory's not that good.

Yes. A problem with obtaining a second opinion, of course, is that the
lawyer providing the second opinion might agree with the opinion proffered
by the first lawyer and then there'd be two - - -?---Possibly.

- - - opinions saying that it's not legal.---Yes, and all that would be reported
to council as well.

30 But why would you bother reporting something to council when you are
told it's not legal - - -?---Because they're entitled to know - - -

- - - and that it shouldn't be submitted?---Well - - -

Well, I'm sorry, your answer is they're entitled to know?---They're entitled
to know.

40 Why is council entitled to know?---Because that's their role, is to
understand this is a key site involving one of our own properties. They
should be apprised of the situation.

But there's nothing they can do.---Well, so what? There's a lot of things
that go up to council they can't do anything about and they accept the
officer's recommendations and often they don't accept the officer's
recommendations. There's nothing uncommon about that.

But this is a situation where the illegality, as you were advised by the IHAP, would be short term, that is to say, until the concurrence authority response had been received to the referral of the DA to it.---Yes.

And then that had been considered by the IHAP, that's what they said in their report. So why would council need to know? Why would you bother them with telling them, oh, there's something else that's going to come back to you possibly at some stage in the future but there's nothing that can be done about that now? Why would you bother council with that?---There were many examples of where things were reported to council - - -

That's not the answer to my question. I'm not interested in whether it happened many times - - -?---Can I finish the answer, please?

It's not an answer to my question. What is the point of telling me it happened many times? I'm asking you, what is the point of that exercise? ---To keep the councils informed, even if they just received a note of their advice.

20 What can they do with that information?---Nothing. It doesn't matter if they decide not to do anything.

That's why it doesn't seem very credible that that was your motive in taking the step that you did.---I'm afraid that was the motivation and I can't offer anything else.

THE COMMISSIONER: I'm sorry, what was the motivation? That - - -?
---To keep the council apprised of the situation because it involved a contentious site that we owned and it had a great deal of public interest around it.

But you could do that, inform them, without what appears to have happened, opening or allowing them to progress it. Can you see the difference? Can't you inform the council, "Look, on this important site, this has arisen, illegality. We've got to go back to RMS, get their concurrence. Anticipate that will take a couple of months. That's where it's up to but we've got to do that. It's the law," for example?---I would have anticipated that would have been incorporated in the report and the views of the legal team in relation to the advice of the IHAP, which I don't even know I saw. But it doesn't matter. That's irrelevant now. Would have been reported to council and it's in the records, it's in the minutes of the council meeting. It's not a memo that I've sent that might finish up in the dust bin without even being read. It's in the records, the official records of the council.

MR BUCHANAN: I'm sorry.

THE COMMISSIONER: That's the business papers.---Yes, or the minutes of the meetings.

MR BUCHANAN: You're making this up as you go along aren't you?
---No, I'm not. No, I'm not. Not at all. Give me some credit, Mr
Buchanan.

10 But don't you understand the point that the Commissioner is making? You
could have provided a one page memo to tell them of something that, in
respect of which they could do nothing, but which might change at a later
stage, and that would be on the record because it would be in council
papers?---Yeah. On, on a file somewhere.

But your step opened the door to council doing something which you were
told, and had nothing to contradict, would be illegal?---That's your opinion
and I don't agree with it.

But it did open the door to it, didn't it?---Did it? I don't know.

20 THE COMMISSIONER: Sorry, you don't agree with Mr Buchanan saying
it opened the door?---Yes.

MR BUCHANAN: Why didn't it open the door?---Well, I don't know. I, I
don't know.

Why did you say that then?---Well, you were the one that said open the
door, I didn't. Why, why did you say that? Sorry, I know I can't ask
questions.

30 THE COMMISSIONER: No, you can't.---But, well, it's a good question
though nevertheless.

MR BUCHANAN: If you want to pursue this, we can, Mr Montague.---No,
I don't particularly want to pursue it, Mr Buchanan.

Do you understand that by putting an item on the agenda of the CDC which
wouldn't otherwise have been on the agenda of the CDC, you were inviting,
you were providing an opportunity to the CDC to make a determination of
the DA?---No, I don't agree with that at all.

40 If the matter wasn't on the agenda, then unless the matter was called up by
the CDC from the floor, it wouldn't have been considered because notice
would not have been given of it.---But that's not the way things happened at
Canterbury. The councillors very seldom called matters up. It was up to
the, the staff to submit reports to council on things that they thought were of
interest.

Thank you for that. And so in that case you accept that had it not been on
the agenda, it wouldn't have been voted upon, it wouldn't have been
determined?---Of course.

And what you did was provided the opportunity for it to be determined, correct?---I don't know what, I don't know what the determination was. I haven't got that in front of me.

You provided the opportunity for it to be determined, didn't you?---No, I provided the opportunity for the council to be brought up to date on, on, on the status of that application in relation to the bowling club.

10 And did you recommend that no step be taken?---I don't know what I recommended now. I don't have the paper. You've got me at a distinct disadvantage.

You can assume that there was no paper that suggests you made a recommendation that no step be taken.---I'm not going to make that - - -

On that assumption, on that assumption, you opened the door to the DA being determined by the CDC in circumstances in which you'd been told it would not be legal to do so, didn't you?---I don't agree with any of that.
20 Assumptions are very dangerous.

Now, in directing that the DA go to the 3 December CDC meeting and be circulated as a late item, notwithstanding the IHAP's deferral request, you were trying to circumvent, I want to suggest, three things. You were trying to circumvent the council's IHAP policy relating to the function of the IHAP in making recommendations to council. Can I take you to volume 2, page 288 in Exhibit 52.

30 THE WITNESS: If I'm permitted, Commissioner. I might be able to speed this up a bit by saying I wasn't trying to circumvent anything.

MR BUCHANAN: Council had an IHAP policy. The IHAP policy, apart from the title page, the first page of it is in front of you on the screen now. That's page 288.---Yep.

And council was empowered to consider DA referred to the IHAP.---Yes.

The criteria for the IHAP considering matters was set out in clause 6.1, I think you can see at the bottom there.---Yes.
40

Can I take you to clause 19.2 on page 299. This was a case where the IHAP sought further information, namely the response of the concurrence authority once the matter had been referred to the concurrence authority?
---Which, sorry, which clause, Mr Buchanan?

I'm sorry, I'm just taking a step back.---Okay.

You'll recall in this case, we can go back to the IHAP report if you like.

---No, no, it's fine.

That council had asked that the DA be referred to the RMS, a concurrence authority, which was required by the applicable state environmental planning policy. You recall that?---Yes. Yes.

And that it had said that once the response of the RMS had been received by council, the matter should be sent back to the IHAP for it to consider.---Yes.

10 And what I'm taking you to now is clause 19.2 of IHAP policy on page 299. "When additional information is sought by the panel, upon submission of that information, the application will be referred back to the panel for final consideration prior to determination by the City Development Committee or council." Do you see that?---Yes.

You were circumventing the policy of council in relation to the handling of DAs that had been the subject of consideration by the IHAP in the circumstances that applied there in clause 19.2, weren't you?---No, I don't accept that at all.

20

Why not?---No. Because I don't. I mean - - -

Yes, but why don't you?---Dear me.

THE COMMISSIONER: Do you agree that 19.2 - - -?---I'm that confused now.

I'm sorry.---Sorry.

30 Do you agree that 19.2, the circumstances set out there were the circumstances that we're considering at the moment, that IHAP – as Mr Buchanan set out – IHAP said we need information from RMS as the concurrence authority. Let's get that. Should come back to the IHAP before we send it off to council or CDC.---Yeah.

So that seems to be the circumstances that 19.2 is covering. Do you agree with that?---Yeah, I, I agree with that. But that was something that was under, under review. Certain councillors had a very different view about that, that it shouldn't be going back to the IHAP anyway. But, and it, and it threatened - - -

40

MR BUCHANAN: So are you saying that you took the step you did on 30 November 2015 of directing that the matter be listed as a late item on the CDC agenda because you were aware of clause 19.2, you appreciated that it applied in this case, but because certain councillors didn't agree with that policy, you were going to circumvent it?---No. The councillors towards the end of the life of the council, some of them were quite critical of the IHAP procedures, that it was going back like a tennis match, back and forwards,

back and forwards, and they weren't making decisions. And as the IHAP is a creature of the council, created by the council, without any statutory, really any statutory authority, I think some of the councillors thought the IHAP is not doing its job properly.

10 But the question is, you know how we talked about whether the LEP had in fact been changed to reflect council policy as to how a planning control might appear in the LEP, we've talked about that before, and the difference between policy of council on the one hand and the law on the other hand, are you saying that because some councillors didn't agree with clause 19.2 being implemented, therefore you are of the view that it needn't be enforced?---No. And an LEP is a very different kettle of fish to an IHAP, which, as I said, has no statutory authority whatsoever, it's a creature of the council, and all of their recommendations go to council.

What is the status of a policy of council?---What do you mean? Sorry, I don't understand.

20 This document is in the policy register.---Yes.

Sorry, I'm using the present tense. Was in the policy register of Canterbury Council.---Yes.

It was a policy that had been adopted by council resolution.---Yes.

30 That is recorded on the front page, the history of the resolutions adopting it and amending. If clause 19.2 had not been amended or excised by resolution of council did that allow you to ignore it or try to circumvent it? ---I didn't try to circumvent anything.

But that was the effect - - -?---Well - - -

- - - of the direction you gave to Mr Stavis on 30 November, 2015 - - -?

---But that's a very, but that's - - -

- - - wasn't it?---But that's a very different thing to saying I, I consciously tried to circumvent the policy. All of the council's policies are under review constantly.

40 But you knew, didn't you, that there was a policy that when additional information was sought by the IHAP then once the information is received it had to go back to the IHAP before it could go to council?---But that, that wasn't top of mind and I did not refer back to the IHAP policies.

So is your defence you forgot?---It could be. I mean, look, I was under, it was, you know, I just - - -

You were under a lot of pressure you were going to say, weren't you?---No, I wasn't going to say that at all.

Yes, you were.---No, I wasn't.

10 What were you going to say?---I was under the belief that these DAs had been too, had been delayed too long. There were many of them, not just ones relating to Canterbury Road, and that we needed to clear the decks and that was one of the things that I wanted Mr Stavis to do as the director of city planning.

20 Are you saying to us that that was what was in your mind and that was what your thinking was when you gave that direction to Mr Stavis?---No. I would say that there was probably some, I may have had a conversation with, with Hawatt for example and he was jumping up and down. He wasn't a great supporter of the IHAP anyway towards the end. He thought it was obstructive. He didn't particularly like some of the people who were on the, on the panel itself and we were always, we're constantly defending the IHAP because I thought the IHAP did a very, very good job and removed a lot of the politics out of the decision making at Canterbury. But having said that, he wasn't a great supporter of the IHAP. Now, he may have rung me and said look, Jim, get this one on the business. We want to sort this one out.

You accept that the step that you took was taken in breach of the IHAP policy?---I don't - - -

30 Clause 19.2.---Yeah. I don't know whether 19.2 strictly applies here. I mean, there, there, there was information. I assumed there were going to be reports presented, that this was a routine procedure to prepare a report in relation to that site and all I asked for was for it to be put up to the first available IHAP, sorry, first available CDC meeting knowing it was the last one of the year and there'd be a council meeting following a week later probably.

It's plain, isn't it, that the step that you took was in breach of clause 19.2? ---It's not plain to me.

40 MR ANDRONOS: I object to this question. Whether the witness sitting in the witness box in December, 2018 accepts as a legal matter there is a breach or not cannot assist you, Commissioner. That's a legal conclusion which there may be a submission on. Whether this witness makes the concession not as a qualified lawyer makes no difference and any concession he makes would be worthless to you and would serve no purpose. There's no forensic purpose to that question being asked or answered.

THE COMMISSIONER: Mr Buchanan?

MR BUCHANAN: Commissioner, in my submission it was the job of the witness to be appraised of policies and laws which confined or gave some colour to what he did as the general manager such as giving directions to senior staff.

MR ANDRONOS: Then ask him what he knew at the time.

10 MR BUCHANAN: And accordingly if he thought that what he was doing was in breach of the council policy that must have some weight with the Commission when deciding what view to take of the matter. If on the other hand he denies that it was in breach, if he gives a credible account, that is a matter that the Commission would take into account. However, if his account is not credible then the Commission wouldn't give much weight to it and it might have further consequences.

20 MR ANDRONOS: Well, almost all of that I agree with because when my friend said if he thought he was complying, then that's a matter relevant for the Commission, I agree. That's not the question that was asked. The question that was asked is what he thinks now.

MR BUCHANAN: That is correct.

MR ANDRONOS: And what he thinks now is irrelevant. It's a perfectly proper question to say whether he thought at the time what he was doing was in breach or whether he knew what he was doing was in breach or whether he turned his mind to whether it was in breach. What he thinks now cannot assist. He is no long a general manager.

30 THE COMMISSIONER: Mr Buchanan, do you - - -

MR BUCHANAN: I do press it, Commissioner, and in my submission the witness is perfectly able to give an answer on the subject, and more to the point, the same consequences follow in terms of findings and weight given to answers, depending upon what they are.

THE COMMISSIONER: So, sorry, can I just confirm. Implicit in your question is that it's Mr Montague looking at this material now?

40 MR BUCHANAN: That is correct.

MR ANDRONOS: I'm not sure I agree it's a breach.

THE COMMISSIONER: I'm sorry. So you - - -

MR ANDRONOS: Well, that's a matter for submission, which I don't have a final opinion on. I'm not entirely sure I'd agree it's a breach.

THE WITNESS: And I don't know that I - - -

MR BUCHANAN: Again, I submit, Commissioner, that if the witness gives an affirmative answer, that is a matter that the Commission would take in to account and if he denies it but can't give a credible explanation, that is a matter that the Commission would take in to account.

10 THE COMMISSIONER: Mr Buchanan, I am interested. Sitting here today, and I know you've given evidence about the IHAP policy and whether it was under review and what the various councillors thought of, but the circumstances have been put to you about this particular proposal and IHAP's report and I will ask you, looking now at it, do you think what you did was in breach of 19.2?---Can we see 19.2 again, if we can?

MR BUCHANAN: Yes, certainly.

MR ANDRONOS: Just for the record, Commissioner, I press the objection, even in relation to that. That's a formal objection.

20 THE COMMISSIONER: I'm going to allow it just by exploring it with Mr Montague at the moment but I note what you've said and - - -

MR ANDRONOS: Well, just perhaps the first question should be does he have a view, and the second question what that view is.

30 THE COMMISSIONER: No. Have a look at 19.2.---Can I ask a question, Commissioner, of Mr Buchanan? When it says, "When additional information is sought by the panel", what additional information is being referred to there, do you know?

MR BUCHANAN: It doesn't qualify it, does it?---No, it doesn't.

And you knew, didn't you, that additional information was sought by the panel in this case?---In relation to the RMS concerns, I think.

Yes.---Yes.

40 So that, that premise is established. You can plainly see that, can't you?
---Oh, of course. I understand that the, yeah - - -

Yes. So, moving on then. "Upon submission of that information, the application will be referred back to the panel for final consideration", et cetera. That state of affairs had not occurred, had it?---Yeah, but, well, okay, I don't know that I even referred to the policy. Given the circumstances at the time, I may have made a rash decision, a rush of blood to the head, to get it up to the first available meeting, which was the last one of the year. I, I accept that but if, if I, I don't know that I actually referred back to the policy and, and, and really, and really considered it carefully, or

that I received advice from anybody else in the organisation, that by putting it back on the business paper, would in fact be a breach of 19.2. I can see now, I'm prepared to concede that putting it back the way I did could have breached 19.2 but I probably didn't, I wouldn't have had 19.2 in front of me because I always took the view with the IHAP, hands off. They, they do their own thing and I knew there was some, there were some concerns being expressed about the efficacy of the IHAP anyway, in the mind of some councillors. It was a mess and it was just happening there and then at that time.

10

THE COMMISSIONER: And sorry, when you say it's a mess, couple of your answers today were praising IHAP and said it was - - -?---A beautiful system, yes.

20

But at this particular point in the way that the council, as in the councillors, were functioning, was it a mess?---Yes, the council, and particularly Councillor Hawatt, had disdain for the IHAP and the members of it. He was particularly critical of the planning, of the planning experts on the panel and that they were just sticks in the mud. They didn't, they didn't know what they were talking about. I was very mindful of that and I defended the IHAP because I thought, as I said earlier, it was one of the best innovations we'd ever introduced.

MR BUCHANAN: So what you're telling us is that, whether you intended to do so or not, what you did was in implementation of the views that you understood that Councillor Hawatt held about IHAP recommendations?

---Yes, I guess so. I have to agree to that, that I was - - -

30

Was that the right thing to do?---No, probably not now, in retrospect, but it's, you know, like I said, you had to take it, you had to consider it at the time and what was happening at that time, and the - - -

Can I take you then to - - -?---Sorry.

- - - back to page 119 of volume 22. This is the second page of the IHAP – I'm sorry, no. Volume 22. Thank you. If we could just blow up the middle of the page.---Sorry, Mr Buchanan.

40

I'm sorry.---What's this document? Can you just explain what this document - - -

This is a document, if we go to the first page, this is the IHAP report. ---Okay, right.

Which you were saying, notwithstanding the report, the matter should - - -? ---But that was the report that went to Statewide Planning, correct?

This is the letter that went to Statewide Planning.---I understand. Yes. Which incorporated elements of the report.

Yes.---Okay.

Now, can I just ask you to, and indeed just on the first page, just in case you have doubt, if we could just go to the preceding page, we could just blow up the middle of the page. "Details of the panel assessment is provided as follows for your information."---Yeah.

10

So what follows is the panel's assessment.---Yeah.

Are you happy with that?---Yes.

If we can go then to page 119, and if we could – thank you. Do you see the paragraph commencing "In addition"?---Yes.

20

Now, you knew, even if you didn't know the number of the clause of the State Environmental Planning Policy concerned, that council couldn't legally determine a development application that was required to be referred to a concurrence authority until a response had been received from the concurrence authority. You knew that, didn't you?---I knew that the, I think it was the RMS needed to supply additional information, yes.

30

No, okay. We'll take it a step at a time. You knew that there was a law that as a State Environmental Planning Policy law that had a provision in it that said thou shalt not, no, a consent authority shall not determine a development application where a response from the concurrence authority to whom a DA has been referred is received.---No, I didn't know that.

And so what did you understand was the law in relation to referring matters to concurrence authorities?---Well, I would have assumed in broad terms that they were referred to the concurrence authorities for some advice. Now, as I've said earlier, I don't believe I ever saw this piece of correspondence, but be that as it may, and that advice would come, come through eventually, and that that would be the subject of further advice to council.

40

And if matters were, if applications were required to be referred to concurrence authorities, plainly to send it off to council so that it is in a position to determine it is to circumvent the requirement that the matter be referred to the consent authority, isn't it?---The consent authority being the council?

No. I'm sorry, yes, you're exactly right.---Yes. Yes. Well, I guess what I did was get ahead of myself in putting it up to the council as a CDC committee, but we don't know whether at that point that the extra advice or the material contained in the IHAP report, and it probably would have been

part of the report to council anyway advising the council that they were acting in appropriately if they attempted to approve it. Now that would have meant that we'd all have egg on our face because the question any councillor could have asked is, well, why didn't you tell us this before? Point taken, I accept that. I don't believe there was any attempt to dupe the council to ask them to make a decision on something they didn't have the legal capacity to do.

10 So there was two sources of information that you had when you gave that direction on 30 November, 2015. One was your own knowledge about the requirement, where applicable, to refer a DA to a consent authority, and the other was this passage in the IHAP report concerned at page 119, "The council cannot legally determine the development application until both the development application and the section 96 modification applicable had been referred to the RMS."---If I read that and I don't believe I did.

20 Why would you not have read it if you were giving a direction which you knew was notwithstanding something that obviously was counter to the direction you were giving or the effect of it?---Well, I was looking at the isolated issue of whether this thing was going to languish on somebody's desk for another six months or six weeks or three weeks as opposed to putting it back up to the committee. I have to admit now that if I knew all this back then, I would have taken a different course.

30 It seems inconceivable that when you have yourself in your direction, as reported to Mr Sammut by Mr Stavis, said, "Notwithstanding the IHAP recommendation this is to go forward" that you didn't know that the IHAP recommendation was not only that it should not go forward but that it was illegal for them to determine the matter.---Well, I'm saying I didn't know and I don't know that material or that comment from Mr Sammut. I think it was, he may have got that wrong, they were internal documents, we were probably operating in different spaces, I don't know if there was any discussion, face-to-face discussion, but I can assure you that if somebody walked into my office at the time that decision was taken and said to me, "Do you know we've got advice from IHAP?" their advice, which probably is open to, open to question perhaps, or somebody might have a different view that we can't do this legally, if somebody had the presence of mind to bring that to my notice, then I guarantee you there'd be a different outcome.

40 And you say it wasn't drawn to your attention?---No, I don't believe it was.

Thank you. I note the time Commissioner.

THE COMMISSIONER: All right. We'll take the lunch break and resume at 2 o'clock.

LUNCHEON ADJOURNMENT

[1.03pm]